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Reviving Focused Scrutiny in the Constitutional Review of Public Health Measures

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REVIVING FOCUSED SCRUTINY IN THE CONSTITUTIONAL REVIEW OF PUBLIC HEALTH MEASURES

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"The permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review."**
--Lance E. Walker, J., U.S. District Court for Maine

ABSTRACT

State and local officials have issued public health orders aiming to prevent or slow the spread of COVID-19. As a result, constitutional challenges have been brought claiming that these measures (stay-at-home orders, mask mandates, etc.) violate the right to free exercise of religion, the right to free assembly, and the right to due process. This Article acknowledges the highly deferential standard applied when assessing whether a government's public health action, during a public health emergency, violates the due process clause. Gatter encourages judges to adopt "focused scrutiny" in these cases, which concentrates judicial attention on the known science of the infectious disease as well as evidence of the efficacy of the government's public heath response. Focused scrutiny complements any applicable constitutional standard of review: strict scrutiny, mere rationality, or otherwise. When both the government's public health action and the constitutional review of that action occur during a declared emergency, Gatter argues this method is necessary to off-set the risk of judicial rubber stamping, to defend against public health policy driven by fear or politics, and to strengthen the scientific basis of public

* Professor of Law, Center for Health Law Studies, Saint Louis University School of Law. I presented a version of the arguments in this Article as part of a virtual conference called "Isolated by the Law Part 2," hosted by Wake Forest University School of Law on April 22, 2020. Thanks to Lyz Riley Sanders and Brian Gatter for their research.

** Bayley's Campground Inc. v. Mills, No. 2:20-cv-00176-LEW, 2020 WL 2791797, at *8 (D. Me. May 29, 2020).

health measures taken during the pandemic.

INTRODUCTION

In response to the coronavirus[1] pandemic in the United States, state and local officials issued a variety of public health orders designed to prevent or slow the spread of the virus across communities and to preserve medical resources for health care providers treating infected individuals suffering from the resulting disease—COVID-19.[2] Business owners, church-goers, and others have challenged the constitutionality of many of these orders, claiming that stay-at-home orders violate a variety of constitutionally protected rights, including the right to free exercise of religion, the right to free assembly, and the right to due process.[3] These litigants often seek temporary injunctions against enforcement of public health measures as the parties prepare for hearings on permanent court orders.[4]

In ruling on motions for temporary injunctions, many courts have interpreted the 1905 decision by the Supreme Court of the United States in *Jacobson v. Massachusetts*[5] to hold that, during a public health emergency, courts must apply a highly deferential standard when assessing whether a government's public health action violates liberties protected under the due process clause.[6] The meaning of *Jacobson* is controversial, and the question of whether conventional substantive due process standards apply to public health measures during normal times or during an emergency is of great legal and practical importance, but it is not the issue this Article addresses.[7]

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1. The coronavirus—or SARS-CoV-2—is the virus that causes the coronavirus disease of 2019, which is more commonly referred to as COVID-19. This Article uses the word "coronavirus" to refer to the virus and "COVID-19" to refer to the disease caused by the virus.

2. *Introducing State Snapshot: A COVID-19 Report*, STATESIDE (Oct. 14, 2020), https://www.stateside.com/blog/2020-state-and-local-government-responses-covid-19 [https://perma.cc/SB6G-HCK3].

3. *See, e.g.*, Planned Parenthood Ctr. for Choice v. Abbott, 450 F.Supp.3d 753 (W.D. Tex. 2020), *vacated*, 954 F.3d 772 (5th Cir. 2020); On Fire Christian Ctr. v. Fischer, 453 F. Supp.3d 901 (W.D. Ky. Apr. 2020); SH3 Health Consulting v. Page, 459 F. Supp.3d 1212 (E.D. Mo. 2020); Legacy Church v. Kunkel, No. CIV 20-0327 455 F.Supp.3d 1100 (D.N.M. 2020).

4. *See id.*

5. 197 U.S. 11 (1905).

6. *See, e.g.*, *In re* Abbott, 954 F.3d 772, 783–786 (5th Cir. 2020).

7. For an analysis of whether *Jacobson* should be used to suspend conventional constitutional review standards during an emergency, *see generally* Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179 (2020). For an analysis of how courts have misinterpreted *Jacobson*, *see generally*

Rather, I accept—only for the sake of argument here—that a standard akin to abuse of discretion or rational basis will be applied by courts in the future when reviewing constitutional challenges to public health measures, particularly public health measures taken during a declared emergency; and then I ask how that standard should be applied.

This Article argues that judicial review of the constitutionality of state actions taken during a public health emergency must be constrained by a scientific focus, which is used to apply any standard of review. If and when a court assesses whether a public health order issued during an outbreak is "rational," it must focus its attention on the known science of the infectious disease at issue as well as evidence of the efficacy of the government's public health measure. Professor Scott Burris introduced this concept in 1989 and coined the phrase "focused scrutiny" to describe it.[8] At the time, he argued that focused scrutiny (which he also called "rational medical basis" testing[9]) would help account for the fear and partisan politics that were driving government actions ostensibly taken to protect the public from the spread of HIV.[10] In this Article, I argue that Burris's "focused scrutiny" concept not only remains valuable in the judicial review of the constitutionality of public health measures today, but also that it is all the more necessary when *both* the government's public health action *and* the constitutional review of that action occur during a declared emergency.

I. THE RUBBER-STAMP RISK OF A PUBLIC HEALTH EMERGENCY STANDARD OF CONSTITUTIONAL REVIEW

At some point, a judicial standard of review—on its face or as applied—becomes so deferential as to become meaningless, in which case, courts understand their function as simply to rubber-stamp state action as constitutional.[11] This is a serious risk associated with the "real and

Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39 (2020). For analysis of how constitutional doctrine with respect to public health measures taken during an infectious disease crisis is under-developed by courts and thus unclear, *see generally* Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J. L & POL'Y 1 (2018).

8. *See* Scott Burris, *Rationality Review and the Politics of Public Health*, 34 VILL. L. REV. 933, 937 (1989).

9. *See id.* at 936–37.

10. *See id.* at 970–82.

11. By "rubber-stamp" I mean the automatic approval by courts of public health orders without

substantial relation" test that several federal courts have adopted to review the constitutionality of public health actions.

The Fifth Circuit recently described and applied the "real and substantial relation" test in *In re Abbott I*.[12] In April of 2020, the Governor of Texas ordered health care providers to suspend for several weeks all medical procedures and surgeries that were not necessary to save the life or limb of a patient.[13] The Governor's claimed purpose for the order was to preserve medical resources for an anticipated surge of patients with COVID-19 in need of treatment.[14] Abortion providers challenged the order as violating the constitutional right of a woman to obtain an abortion, and they sought a temporary restraining order (TRO) to enjoin the state from enforcing the order against abortion providers while the parties prepared for trial.[15] The Federal Court for the Western District of Texas granted the petitioner's motion for TRO, holding that they were likely to succeed on the merits in establishing that the Governor's order placed an undue burden on the right to obtain an abortion.[16]

Texas officials immediately petitioned for and received a writ of mandamus from the Fifth Circuit ordering the federal district court to vacate its TRO.[17] A writ of mandamus is an extraordinary measure of relief that is granted only in response to a "judicial usurpation of power or a clear abuse of discretion."[18] Here, the Fifth Circuit claimed that such a writ was necessary because the federal district court had failed to apply or even acknowledge what the Court of Appeals called the "framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago" in *Jacobson*.[19]

The Fifth Circuit described this framework and the judicial deference it

proper or otherwise meaningful judicial review. At least one court during this pandemic has acknowledged the "rubber-stamp risk" associated with *Jacobson*'s "real and substantial relation" standard. *See* Bayley's Campground Inc. v. Mills, No. 2:20-cv-00176-LEW, 2020 WL 2791797, at *8 (D. Me. May 29, 2020) ("[t]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review.").

12. 954 F.3d 772 (5th Cir. 2020).
13. Exec. Order No. GA-09 (2020).
14. *See In re* Abbot 954 F.3d at 777.
15. *See id.* at 780.
16. *See* Planned Parenthood Ctr. for Choice v. Abbott, 450 F. Supp. 3d at 758-59.
17. *See In re* Abbot, 954 F.3d 772.
18. *Id.* at 781.
19. *Id.* at 783 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

demands in its application. The standard, said the Court, is applicable during a "public health crisis."[20] Additionally, the emergency standard articulated in *Jacobson* is based on the principle that individual liberties may be restrained "'by reasonable regulations'" at times when a community is "'under the pressure of great dangers.'"[21] Under the *Jacobson* standard—at least as understood by the Fifth Circuit—a court may declare unconstitutional a law designed to protect the public health only when it "'has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'"[22] Moreover, the Fifth Circuit emphasized that a reviewing court must defer to government with respect to its decision to enact a public health measure and its choice of which measures to enact, warning that, otherwise, a reviewing court would "'usurp the functions of another branch of government'" if it were to declare public health action unnecessary or arbitrary.[23]

The Fifth Circuit then summed up the applicable emergency standard of review:

> [W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' [] Courts may ask whether the state's emergency measures lack basic exceptions for 'extreme cases,' and whether the measures are pretextual—that is, arbitrary or oppressive. [] At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.[24]

There is a significant likelihood that this standard results in judicial rubber-stamping even when the standard is just taken at face value. Add to this the way the Fifth Circuit applied the standard when *In re Abbott*

20. *See id*.
21. *See id*.
22. *See id*. at 784 (quoting Jacobson v. Massachusetts, 197 U.S. at 31).
23. *See id*. at 784–85.
24. *Id.*

returned to that appellate court, and that likelihood increases all the more.

Following the Fifth Circuit's writ of mandamus, the district court vacated its original TRO, and the same abortion providers immediately sought and received a new TRO from the same district court.[25] The second TRO was narrower and was based upon 31 findings of fact, one of which was that the Governor's order suspending abortion procedures would result in greater use of medical resources because patients who remained pregnant as a result of the order would continue to require examination and treatment during the term of the order.[26] The district court concluded that the order failed the standard established by *Jacobson*.[27] Texas officials again petitioned the Fifth Circuit for a writ of mandamus with respect to this second TRO, and again the Court of Appeals granted the writ.[28] In so ruling, the Fifth Circuit chastised the district court for basing its decision in part on the finding that the Governor's order works against its stated purpose by prolonging the time period during which a patient is pregnant and requires prenatal care that uses valuable medical resources.[29] The Court of Appeals held that this amounted to second-guessing a policy choice and usurping the powers of the executive branch.[30] Moreover, the Court of Appeals used the pandemic as justification for its use of mandamus:

> [T]he current global pandemic has caused a serious, widespread, rapidly escalating public health crisis in Texas. Petitioners' interest in protecting public health during such a time is at its zenith. In the unprecedented circumstances now facing our society, even a minor delay in fully implementing the state's emergency measures could have major ramifications . . . .[31]

The message is clear at least from the Fifth Circuit. Any lower court that fails to defer to the actions taken by the state in the name of public health, and does so during a declared disease emergency, has very likely

25. *See* Planned Parenthood Center for Choice v. Abbott, 2020 WL 1815587 (Apr. 9, 2020).
26. *See id*. at *4.
27. *See id*. at *6.
28. The Court granted in part and denied in part the petition for writ of mandamus. *In re* Abbott, 956 F.3d 696 (5th Cir. 2020).
29. *Id*. at 709.
30. *See id*. at 717.
31. *Id*. at 723 (citing *In re Abbott*, 954 F.3d at 795).

abused its judicial discretion so dramatically as to justify mandamus even before the matter can go up on appeal. In essence, the Fifth Circuit has interpreted *Jacobson* to all but require a judicial rubber-stamp for the duration of the pandemic.

The rubber-stamp risk is the risk that fear or politics—operating under the cover of an emergency—determines our public health response to an infectious disease outbreak rather than the best available scientific evidence about the disease and the effectiveness of various response options. It is the risk that individuals are unnecessarily or even irrationally deprived of personal liberties. And it is the risk that the citizenry loses its confidence in our public health system, perceiving it as untethered from science and just another arena for partisan politics.

II. TWO EBOLA RULINGS AND THE RISK OF UNFOCUSED SCRUTINY

The need to focus judicial review on the science of an infectious disease outbreak is most obvious from an examination of two federal court rulings that upheld state quarantines of individuals exposed to Ebola but who did not have any symptoms of the disease. In each case, the judge failed to account for the particular nature of Ebola and instead lumped Ebola into a broad category of dangerous infectious diseases for which quarantines had been ordered and upheld as constitutional.[32]

As a reminder, Ebola—unlike measles or even the coronavirus—is not easily transmissible human-to-human.[33] Ebola transmission occurs when an uninfected person comes into direct contact with the "wet" symptoms (vomit, feces, blood) of a person in the throes of the illness.[34] Ebola has other symptoms—"dry" symptoms such as fever, nausea, and malaise—that precede the wet symptoms by a day or more.[35] The dry symptoms do not pose a significant risk of transmission, but they are a natural early warning

32. *See generally* Hickox v. Christie, 205 F. Supp. 3d 579 (D.N.J. 2016); Liberian Cmty. Ass'n of Conn. v. Malloy, No. 3:16-CV-00201(AVC), 2017 WL 4897048 (D. Conn. Mar. 30, 2017).
33. *See Ebola Virus Disease*, WORLD HEALTH ORGANIZATION (Feb. 10, 2020), https://www.who.int/en/news-room/fact-sheets/detail/ebola-virus-disease [https://perma.cc/G4J4-Q2EG].
34. *See id.*; *see also* Gustavo E. Velásquez et al., *Time from Infection to Disease and Infectiousness for Ebola Virus Disease, A Systematic Review*, 61 CLIN. INFECT. DIS. 1135, 1135 (2015).
35. *See id.* at 1135, 1139.

that the person experiencing those symptoms should be put into isolation in anticipation of the onset of the dangerous wet symptoms.[36]

Many people were unnecessarily quarantined during the 2014 Ebola scare in the United States.[37] The constitutionality of only two state quarantine orders was subject to judicial review.[38] In one case, a nurse—Kaci Hickox—who had volunteered to treat Ebola patients in West Africa, was quarantined by the State of New Jersey when she re-entered the U.S. at Newark International Airport.[39] In the other, a family from Liberia was quarantined by Connecticut officials when the family, traveling on a valid visa, visited the state.[40] None of the individuals displayed the dry or wet symptoms associated with Ebola.[41]

Each plaintiff sued state officials under § 1983 claiming that the quarantines had violated their constitutionally guaranteed due process rights and seeking compensation.[42] In both cases, the federal courts dismissed the claims based on the defendants' qualified immunity.[43]

The federal district courts in New Jersey and Connecticut addressed whether the actions of state officials in quarantining the plaintiffs violated their clearly established legal rights. Each Court looked to *Jacobson* to assess the plaintiffs' substantive due process rights, and each Court held that a quarantine is unconstitutional only if it lacks a "real or substantial relation" to the public health goal of preventing the spread of a dangerous infectious disease.[44] Each judge then analogized to a federal case upholding the quarantine of a person exposed to smallpox and who could not prove that

36. Robert Gatter, *Three Lost Ebola Facts and Pandemic Preparedness*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 191, 198 (2018).

37. *See* ACLU & YALE GLOB. HEALTH JUSTICE P'SHIP, FEAR, POLITICS AND EBOLA: HOW QUARANTINES HURT THE FIGHT AGAINST EBOLA AND VIOLATE THE CONSTITUTION 29 (2015), https://www.aclu.org/sites/default/files/field_document/aclu-ebolareport.pdf [https://perma.cc/2GJE-RBZA].

38. *See, e.g.*, Hickox v. Christie, 205 F. Supp. 3d 579 (D.N.J. 2016); *see also, e.g.*, Liberian Cmty. Ass'n of Conn. v. Malloy, No. 3:16-CV-00201(AVC), 2017 WL 4897048 (D. Conn. Mar. 30, 2017).

39. *See* Hickox, 205 F. Supp. 3d at 585-587 (D.N.J. 2016).

40. *See* Liberian Cmty. Ass'n of Conn., 2017 WL 4897048, at *4-*5.

41. The state of New Jersey claimed that Kaci Hickox registered a slight fever when she was first examined after her plane landed, but officials took her temperature repeatedly after that initial check using more accurate thermometers, and none of those readings indicated that she had a fever. Complaint at ¶¶ 31, 49, 56–61, Hickox v. Christie, 205 F. Supp. 3d 579 (D.N.J. 2016) (No. 2:15-CV-07647).

42. *See* Hickox, 205 F. Supp. 3d at 584; Liberian Cmty. Ass'n of Conn., 2017 WL 4897048, at *7.

43. *See* Hickox, 205 F. Supp. 3d at 605; Liberian Cmty. Ass'n of Conn., 2017 WL 4897048, at *14.

44. Hickox, 205 F. Supp. 3d at 591; Liberian Cmty. Ass'n of Conn., 2017 WL 4897048, at *10.

she had been vaccinated for the disease.[45] From this, the Courts concluded that it is reasonable for state officials to quarantine anyone exposed to a dangerous infectious disease and to do so for the remaining duration of the disease's incubation period.[46] Because the quarantine orders reviewed in each of these two Ebola cases were based on the facts that each plaintiff had been exposed to Ebola, that Ebola has a two-week incubation period, and that each quarantine was ordered only for the duration of the incubation period for each plaintiff, the courts ruled that the quarantines were rational and that the plaintiffs' due process rights were not violated.[47]

Neither Court, however, accounted for ways that Ebola is different from smallpox and how these differences undercut any rationale state officials could have had to quarantine someone exposed to Ebola who does not show any symptoms of the disease. Had these judges considered the well-known facts about the way Ebola is transmitted, the way the disease progresses in a person, and the timing and risks posed by the disease's symptoms, it stands to reason that they would have ruled differently. Quarantining a person exposed to Ebola and who is not experiencing the preliminary dry symptoms is unreasonable and arbitrary because no such person has ever transmitted the disease to another. At most, health officials are justified in ordering that such individuals be subject to ongoing monitoring so as to determine whether they ever experience the dry symptoms.

By failing to focus on the science of Ebola, and by instead rubber-stamping the actions of New Jersey and Connecticut officials, these two federal courts upheld public health measures that unnecessarily deprived several individuals of their personal freedoms. These judges missed the opportunity to declare unconstitutional the policy of many states during the Ebola scare to quarantine asymptomatic individuals who were exposed to the disease. During the scare, one consequence of those state policies was to reduce the number of health care and public health professionals willing to volunteer to treat Ebola at its source in West Africa so as to help prevent its spread to the U.S. and elsewhere.[48] By failing to set the constitutional

45. Hickox, 205 F. Supp. 3d at 592–93; Liberian Cmty. Ass'n of Conn., 2017 WL 4897048, at *10–*12.
46. Hickox, 205 F. Supp. 3d at 593–594; Liberian Cmty. Ass'n of Conn., 2017 WL 4897048, at *11–*12.
47. Hickox, 205 F. Supp. 3d at 593–594; Liberian Cmty. Ass'n of Conn., 2017 WL 4897048, at *11–*12.
48. *See* Gatter, *supra* note 37, at 202–03.

record straight even after the scare was over, these Courts undermined our preparedness for future pandemics by perpetuating the chilling effect of arbitrary state polices born out of fear of an infectious disease.

III. FOCUSED SCRUTINY AND ITS VALUE DURING A PANDEMIC

Focused scrutiny, as envisioned by Professor Burris, requires a rational medical basis for public health actions taken by government:

> The test . . . places a medical limitation on state policymaking that has two distinct components. The first, a requirement that the decision be medically justified, precludes all manner of other possible explanations for a health measure, from preserving social morale to saving money. Whatever explanations are offered of the means and ends of the measure must be medical ones. But the requirement does more than limit the universe of justifications: the Court's specification that the medical judgment be 'reasonable' precludes the kind of logical but far-fetched claims that would be enough to sustain an action under the rational basis test. . . . A challenger carries her burden only if she can show that the health measure in question is not medically reasonable under the actual conditions in which it is applied. Mere disagreement between medical authorities, or uncertainty as to the value of the chosen action, will not be enough.[49]

Burris derived this test from the Supreme Court's ruling in *School Board of Nassau County, Fla. v. Arline*.[50] It is not a constitutional ruling. Instead, the issue was how to apply a federal disability discrimination statute in the case of a teacher who was discharged by a public school district from her faculty position because she had tuberculosis, which could become active from time to time.[51] The school district was concerned that the teacher might infect students or others at school if her disease became active while

49. Burris, *supra* note 8, at 978–79.
50. 480 U.S. 273 (1987); Burris, *supra* note 8.
51. 480 U.S. at 275–277.

she was employed.[52] The statute prohibits discrimination against any person who is disabled or perceived as disabled, which—the Court ruled—included someone who has or is perceived to have a dangerous infectious disease.[53] But the protection applies only when the person is "otherwise qualified" for the benefit at issue. The Supreme Court addressed the question of what "otherwise qualified" means in the context of a person with or perceived to have an infectious disease.[54] The Court held that, when assessing whether a person with a contagious disease is "otherwise qualified" for employment, federal courts must make:

> '[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.' In making these findings, courts normally should defer to the reasonable medical judgments of public health officials.[55]

These, Burris says, are the elements for assessing the rationality of any public health measure taken to prevent the spread of an infectious disease.[56] He argues that these elements should guide the way courts apply the conventional rational basis test when reviewing the constitutionality of government actions designed to control a communicable disease.[57]

By constraining courts to an assessment of the best available scientific information about a disease, focused scrutiny narrows the scope of a judge's inquiry into the rationality of public health measures. Yet, it does not otherwise alter the rational basis standard. Focused scrutiny "does not shift the burden of justification to the state. The state does not need to prove that it is right, but only to produce a reasonable medical judgment suggesting

52. *Id.* at 275–277, 281.
53. *Id.* at 277–86.
54. *Id.* at 287–89.
55. *Id.* at 288 (quoting Brief for the American Medical Association as Amicus Curiae Supporting Respondent, Sch. Bd. of Nassau Cnty., Fla. v. Arline, 480 U.S. 273 (1987) (alteration in original)).
56. Burris, *supra* note 9.
57. Burris, *supra* note 9.

that it is not wrong."[58] Additionally, focused scrutiny would not "change the [deferential] nature of the constitutional inquiry. In the rational basis health case, the court does not sit to choose or require the 'best solution,' but only to guarantee that the challenged state action has enough of a medical basis to be reasonable in public health terms."[59]

Focused scrutiny should be expanded to more explicitly include an inquiry into the likely effectiveness of the public health measures taken by government. Whether a rational basis exists to believe that a quarantine order or other governmental action will result in achieving the public health goal is a necessary part of applying rational basis testing. The list of findings as articulated by the Supreme Court in *Arline*, however, does not address this, most probably because the Court was addressing the meaning and application of the "otherwise qualified" element of the relevant federal disability discrimination statute.[60] The Court was not conducting a rational basis test of the school district's action. Professor Burris's test accounts for this generally when it states that focused scrutiny requires a showing that there is a medically rational basis for the means-end nexus.[61] So I add to the test that courts determine whether, given available and reliable evidence, there is a reasonable medical or public health basis for the government to believe that the action it has chosen to take can serve the government's stated goal.

This means-ends step of the focused scrutiny standard likely has more teeth today than it did when Professor Burris developed the concept in 1989. Legal epidemiology—"[t]he scientific study of law as a factor in the cause, distribution and prevention of disease and injury"[62]—was created and developed into a field of study since then.[63] Researchers in the field have published and continue to publish a wide variety of empirical studies measuring the effectiveness of public health law and policy interventions.[64]

58. Burris, *supra* note 8, at 978.
59. Burris, *supra* note 8, at 979.
60. See Arline, 480 U.S. at 275.
61. *See* Burris, *supra* note 8.
62. *Legal Epidemiology*, NAT'L ENVTL. HEALTH ASS'N, https://www.neha.org/legal-epidemiology [https://perma.cc/3NBX-T7R9].
63. Indeed, Professor Burris is a founder of the field and is one of the co-authors of a leading treatise. *See generally* SCOTT BURRIS, MICAH L. BERMAN, MATTHEW PENN & TARA RAMANATHAN HOLIDAY, THE NEW PUBLIC HEALTH LAW: A TRANSDISCIPLINARY APPROACH TO PRACTICE AND ADVOCACY (2018).
64. The Community Guide, for example, conducts and publishes systematic reviews of public

With such a rich source of evidence about what works and what does not work to promote public health, courts should hold health officials accountable to that data when assessing whether governmental action to control an infectious disease has a rational medical basis.

Because focused scrutiny probes the logic underlying public health actions when assessing its constitutionality, it is analogous to judicial "hard look" review of administrative agency actions.[65] When reviewing discretionary actions by administrative agencies to determine whether they can be set aside as arbitrary or capricious or an abuse of discretion, courts thoroughly parse the logic of the agencies' decisions in its rigorous application of an otherwise deferential standard of review.[66] The Supreme Court has held that the test requires courts to determine "[w]hether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[67] The Court described this as "a thorough, probing, in-depth review."[68] Ultimately, however, this probe into the agency's analysis does not change the deferential nature of the standard of review, as exhibited by the Court's statement that, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."[69]

A leading value of focused scrutiny in the application of rational basis testing is that it provides a structure for deploying the relatively deferential test so as to prevent courts from rubber-stamping public health measures reflexively. Consider, for example, how focused scrutiny would have likely changed the outcomes in the two Ebola cases summarized above. Had each judge been forced by the legal standard to make a finding of fact based on then-existing medical knowledge about the modes of Ebola transmission

health law and policy effectiveness data. *See generally* THE COMMUNITY GUIDE, https://www.thecommunityguide.org/ [https://perma.cc/LK7C-WLEA].

65. Indeed, I have argued elsewhere that individuals seeking to challenge public health measures, including quarantine, may be more successful challenging the action under the relevant administrative procedures act and bypassing the qualified immunity barrier that accompanies a section 1983 claim. *See* Gatter, *supra* note 36, at 209–210.

66. *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971). This test is informally known as the "hard look" standard of review. *See* MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 672 (4th ed. 2014).

67. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. at 416.

68. *Id*. at 415.

69. *Id*. at 416.

and the probability in these cases that Ebola would be transmitted to others via those modes, the Courts would have had their attention drawn to the absence of any significant transmission risk posed by the returning nurse and the visiting Liberian family members. In the absence of any such risk, the Courts would have ruled that the state officials' quarantine orders were not reasonable or rational and that they did not have a "real or substantial relation" to the purpose of the quarantine, which was to prevent the transmission of Ebola to others.

Focused scrutiny also would undercut the Fifth Circuit's holding in *In re Abbott* that the lower court usurped the power of the executive branch by second-guessing whether an order suspending abortion procedures in Texas could rationally achieve the state's goal of conserving medical resources for the treatment of COVID-19 patients.[70] Given that the focused scrutiny standard would require a court to assess that there is a rational medical basis for the Governor of Texas to conclude that keeping more people pregnant by suspending abortions would reduce the use of medical resources that might otherwise be needed to treat COVID-19 patients, the district court's inquiry and finding are not only appropriate, but mandatory. It would hardly be a basis for the Fifth Circuit to take the dramatic and extraordinary step of issuing a writ of mandamus.

Moreover, focused scrutiny would bring additional value to judicial review of the constitutionality of public health measures, particularly those reviewed during a declared disease emergency. As exemplified by the Fifth Circuit's *In re Abbott* opinion in support of its issuing a first writ of mandamus, when a public health emergency exists, courts perceive that they owe even greater deference to state officials because the interests of the state are "at their zenith" and a judge does not want to be the cause of "even a minor delay in fully implementing the state's emergency measures" that, in turn, "could have major [public health] ramifications."[71] Thus, the rubber-stamp risk is most likely to materialize when courts perceive that they owe deference to state officials multiple times over because (1) the legal standard calls for deference, (2) state health officials have expertise in public health that the court lacks, and (3) the community is in the midst of an emergency that requires quick action by the state. Focused scrutiny provides judges

70. *See supra* note 11, 28 and associated text. *See In re* Abbott, 954 F.3d 772; Planned Parenthood Ctr. for Choice v. Abbott, 450 F.Supp.3d 753.

71. *In re* Abbott, 954 F.3d 772, 795.

with a specific standard for making factual inquiries efficiently and for doing so while still respecting the legal standard and the expertise of public health officials.

Moreover, judges are human and subject to the same fears as others over the spread of a dangerous infectious disease. Judges are susceptible to making significant logical errors as a result of intuitive, snap judgments deriving from their human emotions.[72] In this way, the specificity of the findings required under focused scrutiny could serve to offset the potential for judges to allow personal fear to undermine the rigor of their reviews.

Finally, as mentioned at the outset of this Article, focused scrutiny has the potential to help maintain public confidence in our public health system by more closely tethering governmental actions taken during a disease emergency to the available science about the disease. The more clearly governmental response is driven by science, the less likely it is for the public to perceive that fear or politics is governing public health. This seems particularly valuable during our current pandemic when confidence in health officials is at risk because of incompetence and the influence of partisan politics.[73]

CONCLUSION

Courts have ruled on a variety of public health orders from state and local governments during the current coronavirus pandemic. And many more judicial opinions will be written on constitutional challenges to mask-wearing requirements, to protocols for opening public schools, new stay-at-home orders re-closing and re-opening (again) businesses as cases wax and wane, and—one day—to vaccine mandates and exemptions.

If the current trend continues, we should expect that many courts will rely on *Jacobson v. Massachusetts* (however erroneously) to hold that public health measures taken by governments during the pandemic are subject only to rational basis testing. When this happens, judges should apply this relatively deferential standard of review based on the focused

72. *See* Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 862–74 (2015).

73. *See generally* Alex Berezow & Josh Bloom, *Coronavirus: Five Reasons Public Health Experts Have Lost Credibility*, AM. COUNCIL ON SCI. & HEALTH (July 16, 2020), https://www.acsh.org/news/2020/07/16/coronavirus-five-reasons-public-health-experts-have-lost-credibility-14915 [https://perma.cc/SJ9V-9R9V].

scrutiny standard originated by Professor Burris and re-articulated here. It is a tool to offset the risk of judicial rubber-stamping, to defend against public health policy driven by fear or politics, and to strengthen the scientific basis of public health measures taken during the pandemic.